Kuching Waterfront Development Sdn Bhd v Superitendent of Lands and Surveys, Kuching Division & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01(IM)-223 OF 2009, Q-01(IM)-224 OF 2009, Q-01–07 OF 2010 AND Q-01–461 OF 2011.

SULAIMAN DAUD, MOHAMED APANDI AND MOHTARUDIN BAKI JJCA

11 SEPTEMBER 2012

Civil Procedure — Appeal — Re-litigation — Whether court could decide question of law in O 14A application — Whether at any stage of proceedings — Whether such question suitable for determination without full trial of action — Whether such determination will finally determine without full trial of action — Whether such determination will finally determine entire cause or matter or any claim or issue — Rules of the High Court 1980

The four appeals arose from the High Court's determination pursuant to an application under O 14A of the Rules of the High Court 1980 ('the RHC'). The appellant ('KWD') was the registered proprietor of the land and subleased the same to Jade Hotel Sdn Bhd. Dewan Bandaraya Kuching Utara ('DBKU') had approved building plans for the Jade Hotel and the land was declared a special development area. However, building works on the Jade Hotel was abandoned. More than a year later, KWD submitted a plan for planning approval for 'hotel cum commercial complex' to the Land and Surveys Department but the same was not approved by the latter. Meanwhile, the land which was excavated for the building of three storey underground car park for Jade Hotel was filled with water and other debris. The Superintendent issued KWD another notice calling upon KWD to re-commence or resume building work on the Jade Hotel. KWD through its architects submitted another plan for hotel and commercial complex to supercede the earlier application made by KWD and KWD also sought waiver of the notice. The application for waiver and the planning approval for a new hotel cum commercial complex were rejected by the government. Another notice was issued to KWD to resume construction works. KWD did carry out certain activities on the land more particularly, de-watering and replacement of hoardings. Consequently, the land was re-entered. The High Court ruled that the plaintiff was entitled to litigate the issue whether it had resumed work for the construction of Jade Hotel.

Held, all four cases ordered to be retried before another High Court judge with no order as to costs:

(1) The court would not hesitate in an appropriate case to decide question of law in an O 14A application. Where only question of law need to be decided, parties should avail the provisions of O 33 r 2 and r 5 for the matter to be tried as a preliminary issue. The court may upon the application of a party or on its own motion determine any question of law or construction or any document arising in any cause or matter at any stage of the proceedings (see paras 7–9).

(2) Order 14A of the RHC enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue (see para 10).

(3) All the four cases were ordered to be retried before another High Court judge in such circumstances with no order as to costs (see para 19).

[Bahasa Malaysia summary

Keempat-empat rayuan berbangkit daripada penentuan Mahkamah Tinggi berikutan kepada permohonan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Perayu ('KWD') adalah pemilik berdaftar tanah dan memajakkan tanah tersebut kepada Jade Hotel Sdn Bhd. Dewan Bandaraya Kuching Utara ('DBKU') telah meluluskan pelan bangunan untuk Jade Hotel tersebut dan tanah diisytiharkan kawasan pembangunan khas. Walau bagaimanapun, kerja-kerja bangunan ke atas Jade Hotel ditinggalkan. Lebih daripada setahun kemudian, KWD memasukkan pelan untuk kelulusan perancangan bagi 'hotel cum commercial complex' kepada Jabatan Tanah dan Ukur tetapi ianya tidak diluluskan oleh Jabatan Tanah dan Ukur. Sementara itu, tanah yang telah digali untuk membangunkan tempat letak kereta tiga tingkat bawah tanah bagi Jade Hotel telah dipenuhi dengan air dan serpihan-serpihan lain. Penguasa mengeluarkan lagi satu notis kepada KWD memanggil KWD untuk memulakan semula atau menyambung kerja membina ke atas Jade Hotel. KWD melalui arkitek-arkiteknya memasukkan pelan lain untuk hotel dan kompleks komersial untuk menggantikan permohonan yang sebelumnya yang dibuat oleh KWD dan KWD juga memohon mengenepikan notis tersebut. Permohonan untuk penepian dan kelulusan perancangan untuk hotel baru merangkap kompleks komersial ditolak oleh kerajaan. Satu lagi notis dikeluarkan kepada KWD untuk menyambung semula kerja-kerja binaan. KWD tidak menjalankan aktiviti-aktiviti tertentu atas tanah dan lebih terutamanya, menyedut keluar air dan penggantian dinding adang. Akibatnya, tanah tersebut dimasukki semula. Mahkamah Tinggi memerintahkan bahawa plaintif berhak untuk melitigasi isu sama ada ia telah menyambung semula kerja untuk pembinaan Jade Hotel.

Diputuskan, keempat-empat kes di perintah dibicara semula di hadapan

hakim Mahkamah Tinggi yang lain, tanpa kos:

(1) Mahkamah tidak akan teragak-agak dalam kes yang wajar untuk memutuskan persoalanan undang-undang di dalam permohonan A 14A. Di mana hanya soalan undang-undang perlu untuk diputuskan, pihak-pihak patut mendapatkan peruntukan A 33 k 2 dan k 5 untuk perkara tersebut dibicarakan sebagai isu awalan. Mahkamah mungkin atas permohonan pihak atau atas usulnya sendiri menentukan apa-apa soalan undang-undang atau pentafsiran atau apa-apa dokumen yang berbangkit dalam apa-apa kausa atau perkara di mana-mana peringkat prosiding (lihat perenggan 7–9).

(2) Aturan 14A KMT membolehkan mahkamah untuk menentukan apa-apa persoalanan undang-undang atau pentafsiran dokumen di mana mahkamah menganggap bahawa soalan sedemikian wajar untuk penentuan tanpa perbicaraan penuh tindakan dan penentuan sedemikian akan akhirnya menentukan tanpa perbicaraan penuh tindakan dan penentuan sedemikian akan akhirnya menentukan keseluruhan kausa atau perkara atau apa-apa tuntutan atau isu (lihat perenggan 10).

(3) Keempat-empat kes diperintahkan untuk dibicara semula di hadapan hakim Mahkamah Tinggi yang lain dalam keadaan sedemikian tanpa perintah kepada kos (lihat perenggan 10).]]]]

Notes

For cases on appeal in general, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 793–1970.

Cases referred to

Chong Ngam Sen v Yeoh Bah Chee [1981] 1 MLJ 161, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812; [2007] 6 CLJ 741, CA (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 5 AMR 696, CA (refd)

Legislation referred to

Building Ordinance 1994 s 65(2)
National Land Code s 33A, 33A(1), (1)(a), (2)
Rules of the High Court 1980 O 14A, O 33 rr 2 , 5

Appeal from: Suit No 06–2008-III (Hight Court, Kuching)

Tan Thiam Teck (Tan and Lim Advocates) and Paul Tang with him (Tan, Yap & Tang Advocates) for the appellant.

JC Fong (Saferi Ali with him) (Superintendent of Lands and Surveyors) for the respondent.

Mohtarudin Baki JCA:

DECISION

[1] This is an appeal against the judgment of the Kuching High Court delivered on 26 May 2009, arising from an application made under O14A of the Rules of the High Court 1980 to determine certain questions of law which are stated in the judgment.

[2] The parties had agreed to hear all four appeals together as they informed us that they arise from the same issues. Thus, our decision intended to cover all four cases which have been fixed for hearing together on 13 February 2012. The four appeals are:

(a) Civil Appeal No Q-01(IM)-224 of 2009 ('Appeal No 224–09') in which the Kuching Waterfront Development Sdn Bhd ('KWD') is the appellant;

(b) Civil Appeal No Q-01(IM)-223 of 2009 ('Appeal No 223–09');

(c) Civil Appeal No Q-01-07 of 2010 ('Appeal No 07–10'); and

(d) Civil Appeal No: Q-01-461 of 2011 ('Appeal No 461–11').

[3] In respect of appeals No (b), (c) and (d), the appellants are (1) Superintendent of Lands and Surveys; (2) Awang Zamhari bin Awang Mahmood; (3) Majlis Mesyuarat Kerajaan Negeri and Government of Sarawak ('the government'). The respondent in all these appeals is KWD.

[4] These four appeals arose from the High Court's determination of the following questions of law pursuant to an application under O14A of the Rules of the High Court 1980. The questions of law are :

1 (a) Whether Section 33A of the Land Code , Sarawak (Cap. 81) is applicable when a registered proprietor of land, within an area which has been declared to be a special development area pursuant to Section 11 of the Land Code, had obtained approval for the erection of a building on his land prior to the enactment/existence of the Building Ordinance, 1994 (Cap. 8)?

1(b) In the event the answer to question 1(a) above is 'Yes', whether Awang Zamhari has complied with the provisions of Section 33A in re-entering the parcel of Land described as Lot 276 Section 48 Kuching Town Land District ('the Land').

1(c) What are the effects or consequences (if any) in the event that AwangZamhari did not comply with the provisions of Section 33A of the Land Code, Sarawak (Cap. 81) prior to re-entering the Land.

2 In the event question 1(a) or 1(b) is answered in favour of KWD, what would, in the circumstances of this case as disclosed in the pleadings filed herein, be the proper cause of action and/or legal remedies or reliefs for KWD in so far as the re-entry of the Land by Awang Zamhari is concerned. A

3 Whether, having regard to provisions of Section 29(1)(b) and (2) of the Government Proceedings Act, 1956, Section 8(3) of the Specific Relief Act, 1950 , and the Land Code, Sarawak (Cap. 81), this Honourable court has the powers or jurisdiction to grant the reliefs (a), (b), (c), (d) and (e) pleaded in the indorsement of the Amended Writ and Amended Statement of Claim of Kuching Waterfront in this action? B

4(a) Whether Section 33A(6) of the Land Code , Sarawak (cap. 81) is null and void as being contrary to or inconsistent with the Constitution of the State of Sarawak? C

4(b) Does MMKN have the power to determine whether to grant relief against forfeiture and/or to impose conditions for the grant of such relief, and if so, what are the limitations (if any) on any condition imposed for the grant of such relief? D

[5] The undisputed facts which canvassed the O 14A application can be summarised as follows:

(a) the title for the said land was issued on 25 February 1982; E

(b) KWD became the registered proprietor of the land on 26 May 1988 and subleased the same to Jade Hotel Sdn Bhd for a period from 28 November 1969–10 August 2777;

(c) Dewan Bandaraya Kuching Utara ('DBKU') approved building plans for the Jade Hotel vide letter dated 7 January 1991; F

(d) on 27 May 1995 the land was declared a Special Development Area pursuant to s 33A of the National Land Code ('the NLC');

(e) building works on the Jade Hotel was abandoned for reasons set out in a letter from KWD's advocates dated 30 November 1995; G

(f) the said letter from KWD's advocates was in response to a notice issued on 22 September 1995 under s 33A(1) by Superintendent of Lands and Surveys for non compliance with s 33A(1) of the National Land Code; H

(g) after the letter dated 20 November 1995 was issued, no construction or building works were carried out on the land. However, on 19 December 1996 (more than a year later), KWD submitted a plan for planning approval for 'hotel cum commercial complex' to the Land & Surveys Department; I

(h) the said plan for hotel cum shopping complex was not approved by the Land & Surveys Department;

(i) Meanwhile, the land which was excavated for the building of three storey underground car park for Jade Hotel was filled with water and other debris. Consequently on 29 March 2005 (about ten years after the initial Notice for re-commencement of work under s 33A(1) was issued in 1995), the superintendent issued KWD another notice calling upon KWD to re-commence or resume building work on the Jade Hotel;

(j) by letter dated 29 April 2005 in response to the said notice, KWD through its architects (Jurubina Unireka) submitted another plan for hotel and commercial complex to supercede the earlier application made by KWD on 1 July 1999 and KWD also sought waiver of the notice dated 29 March 2005;

(k) the application for waiver and the planning approval for a new hotel cum commercial complex were rejected by the government;

(l) on 10 October 2005, another notice was issued to KWD to resume construction works;

(m) KWD did carry out certain activities on the land after 10 October 2005, more particularly, dewatering and replacement of hoardings but after 31 December 2005, no de-watering activity took place anymore;

(n) consequently, on 13 February 2006, the land was re-entered;

(o) KWD then, through its advocates, Messrs Tang & Partners submitted to MMKN, a petition for relief against forfeiture. The petition, sent under cover of a letter from Messrs Tang & Partners dated 12 April 2006; and

(p) the petition was granted by MMKN subject to a condition that RM12,758,941 in cash be paid by KWD to DBKU as security to ensure that construction work of the development on the land is completed diligently and satisfactorily.

[6] In relation to the High Court's decision on Question 1(a) and (b), the appellant is challenging the interpretation made by the learned judge to s 33A(1)(a) and 33A(2) of the NLC and s 65(2) of the Building Ordinance 1994. The learned judge on 26 May 2009 answered the said Question 1(a) and (b) in the affirmative. However,after having delivered his decision on the O 14 application, the learned judge on 11 September 2009 further ruling that 'the plaintiff is entitled to litigate the issue whether it had resumed work for the construction of Jade Hotel' notwithstanding that he had given an equivocal affirmative answer to Question 1(b).

[7] It is trite that the court will not hesitate, in an appropriate case, to decide questions of law under O 14, even if the question of law is at first glance of some complexity and therefore takes a little longer to understand. In addition, where there was a question of law raised and not determined, leave to defend should

be given (see *Chong Ngam Sen v Yeoh Bah Chee* [1981] 1 MLJ 161).

[8] Furthermore, the court will not hesitate in an appropriate case to decide question of law in an O 14A application. It is an agreed fact that where only question of law need to be decided, parties should avail the provisions of O 33 rr 2 and 5 for the matter to be tried as a preliminary issue.

[9] It has to be noted that, the court may upon the application of a party or on its own motion determine any question of law or construction or any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:

(a) such question is suitable for determination without the full trial of the action and;

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

[10] The principles of law relating to an application under O 14A was discussed in the Court of Appeal in the case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 5 AMR 696. The order enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue.

[11] In *Petroleum Nasional Bhd*'s case, the Court of Appeal laid down the principles on the ambit of O 14A application namely:

(a) an issue is 'a disputed point of fact or law relied on by way of claim in defence';

(b) a question of construction is well capable of constituting an issue;

(c) if a question of construction will finally determine whether an important issue is suitable for determination under O 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue; and

(d) respondents to an application under O 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be

such as were known, to the parties when the agreement was made. In the absence of such evidence the court should not refrain from dealing with the application.

[12] In the instant case, it was argued that the learned judge did not make the order as to the 'reasonableness' of the award made by MMKN for compensation of acquisition.

[13] No authority on the principle that the matter can be disposed of partly by way of O 14A and partly by full trial.

[14] It is clear that if parties agreed as to the relevant facts then only the question of law is to be decided by O 14A application (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812; [2007] 6 CLJ 741).

[15] The appellant argued that the 're-entry' under s 33A of the NLC was lawful. The HCJ has made a finding of fact that plaintiff had resumed work. Therefore, Question 1(b) cannot be answered. Going to the question of facts – whether plaintiff had resume work? 're-entry' was unlawful. These issues are questions of fact, which can only be determined at a full trial.

[16] The HCJ should consider whether on the available undisputed fact, he will be in position to determine the core or primary issue.

[17] Counsel for the appellant argued that, in Question 1(b), there is no question of facts involved.

[18] Question 1(a) and (b) are not suitable for determination without the full trial of the action. It is due to the fact that these questions cannot be separated from each other. In our view, Question 1(b) is a question of fact andtherefore O 14A is not a proper mode of disposal. Allowing it will amount to miscarriage of justice.

[19] Therefore, we ordered that all the four cases to be retried before another High Court judge in such circumstances, we make no order as to costs.

All four cases ordered to be retried before another High Court judge with no order as to costs.

Reported by Aifiq Mohamad Noor